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**MAR 18 2011**  
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March 15, 2011

**RECEIVED**

**MAR 21 2011**

AIR QUALITY  
PROGRAM

**Via E-mail & Certified Mail**

Board of Minerals and Environment  
c/o Charles D. McGuigan  
523 East Capitol Avenue  
Pierre, South Dakota 57501

Re: In the Matter of the Prevention of Significant Deterioration (PSD) Air Quality Permit  
Application of Hyperion Energy Center – Hyperion Refining LLC  
Permit No. 28.0701.PSD  
*Before the Board of Minerals and Environment*

Dear Board Members and Counsel:

Enclosed please find *Hyperion Refining, LLC's Reply to Citizens' Response to Hyperion's Motion for Scheduling Order and Motion for Entry of Scheduling Order* for filing.

Thank you for your attention and assistance in this regard. Please do not hesitate to contact me should you have any questions.

Very truly yours,

MUNSCH HARDT KOPF & HARR, P.C.



Amy Rickers

AR/ta

Enclosure



cc:

**Via E-mail & Certified Mail**

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MAR 18 2011

AIR QUALITY  
PROGRAM

**BEFORE THE  
BOARD OF MINERALS AND ENVIRONMENT  
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES**

IN THE MATTER OF THE	)	
PREVENTION OF SIGNIFICANT	)	
DETERIORATION (PSD) AIR	)	
QUALITY PERMIT APPLICATION	)	PERMIT #28.0701-PSD
OF HYPERION ENERGY CENTER -	)	
HYPERION REFINING LLC	)	
	)	
	)	
Draft Permit Issued: 9-08	)	
Final Proposed Permit Issued: 12-08	)	

**REPLY TO CITIZENS' RESPONSE TO HYPERION'S MOTION FOR SCHEDULING  
ORDER AND MOTION FOR ENTRY OF SCHEDULING ORDER**

Hyperion Refining, LLC ("Hyperion"), by and through its undersigned attorneys, respectfully submits this Reply to Citizens' Response to Hyperion's Motion for Scheduling Order and Motion for Entry of Scheduling Order and moves entry of a scheduling order as originally submitted by Hyperion and attached hereto as Exhibit A or a revised scheduling order as proposed in Exhibit B attached hereto. In support of this motion, Hyperion would respectfully show as follows:

1. Citizens' proposed scheduling order unduly delays the necessary proceedings in this matter, failing to even begin the discovery period until May 2011.
2. Much of Citizens' response to Hyperion's requested scheduling order centers on the fact that Citizens requested a 30-day extension of the public comment period. Secretary Pirner responded to this and other requests by extending the comment period to April 1, 2011. This establishes the deadline for the Department of Environment and Natural Resources ("DENR") to respond to comments and produce the final proposed revised permit of May 2, 2011.

3. Contrary to Citizens' claims Hyperion's proposed timeline upholds the intent expressed in the Sixth Circuit Court's Order. Citizens have had and will have ample time to obtain and review information regarding what should be a limited scope of issues in the contested case hearing.
4. Citizens seem to either ignore or dismiss the Sixth Circuit Court's finding that the "additional evidence" to be considered was both material and that there was good reason for failure to present the additional evidence in the original proceeding before the agency. As the Court noted, "[t]he Court is simply ordering additional evidence on the specified issues, and otherwise leaving the Board within its discretion and power as set forth by statutes and applicable case law."
5. As noted in Hyperion's Motion for Scheduling Order, Hyperion's request is limited to those issues established in the Sixth Circuit Court's Order. It is unnecessary and indeed improper to allow argument or evidence regarding any portion of the permit previously adjudicated in the prior contested case hearing. Therefore, due to the limited nature of the topics to be covered, an extended discovery period and delayed hearing are unnecessary.
6. The posturing of Citizens leaves one wondering if Citizens expects the contested case hearing to encompass the entire, previously litigated issues of this permit, subjecting the Board to another extended hearing.
7. Citizens criticize Hyperion's proposed schedule as "suggesting discovery be served before the final proposed permit is issued is unreasonable." However, it would be inefficient to hold all discovery until a final proposed permit is issued. To the extent Citizens have concerns regarding the proposed permit, it is entirely

reasonable to begin requesting information on those issues from the parties at this time. The parties would then have a continuing obligation to supplement any discovery responses with additional information derived from or involved with the final revised permit determination. Additionally, this comports with the scheduling of the previous contested case hearing when discovery began in November 2008 with the final proposed permit issued in December 2008.

8. Furthermore, Citizens have been aware of the issues involved in the permit revisions since at least June 2010 and have had ample time to determine what issues it may raise and what information it would like to see from the parties. Citizens provide no sufficient reason that discovery, the comment period, and DENR's finalization of the revised permit could not run simultaneously.
9. In fact, Citizens offer no viable reason for delaying the start of discovery. Information is now available and review of that information should have already commenced. If there is additional information Citizens feel is pertinent to its review it should begin requesting that information immediately, not waiting the suggested two months to propound such inquiries. In reality, Citizens requested inquiry into a number of these matters at the previous contested case hearing. Therefore, it is implausible that it is now unaware and unprepared to begin discovery on these issues.
10. The information Hyperion submitted to DENR has been posted on the department's website for months. This information has been available to Citizens and any other concerned person.
11. Citizens claim a determination must be made regarding the limited information

and documents involved in Hyperion's request for protection before it can move forward in this process. This argument only lends credibility to the perception that Citizens are unduly delaying this process. Further, the limited amount of information involved in the request for protection should not preclude or delay the beginning of discovery for the same reasons discussed above.

12. With its proposed two month delay in start of discovery, Citizens are requesting the equivalent of 4 months for discovery, the same amount of time allotted by the Board in the previous contested case hearing regarding the entirety of the permit. It seems unnecessary to allot such a lengthy timeframe for what should be a limited number of topics in this hearing. Additionally, the timeframe proposed by Citizens, from pretrial to hearing, is equivalent to that set in the previous hearing before the Board. There is no need for the same amount of time in this limited proceeding.

Hyperion respectfully requests the Board enter a scheduling order as proposed by Hyperion.

Dated this 15th day of March, 2011.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served via E-mail and United States Mail, postage prepaid, on this 15th day of March 2011, to:

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Pierre, South Dakota 57501



Amy Rickers



**BEFORE THE  
BOARD OF MINERALS AND ENVIRONMENT  
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES**

IN THE MATTER OF THE	)	
PREVENTION OF SIGNIFICANT	)	
DETERIORATION (PSD) AIR	)	
QUALITY PERMIT APPLICATION	)	PERMIT #28.0701-PSD
OF HYPERION ENERGY CENTER -	)	
HYPERION REFINING LLC	)	ORDER FOR CONTESTED
	)	CASE HEARING AND SCHEDULING
	)	ORDER
Draft Permit Issued: 9-08	)	
Final Proposed Permit Issued: 12-08	)	

This matter came to the attention of the Hearing Chairman pursuant to a motion of Hyperion Refining, LLC ("Hyperion") to establish a contested case hearing and scheduling order with regards to Hyperion's request for extension of its "commence construction" deadline in Prevention of Significant Deterioration Air Quality Preconstruction Permit No. #28.0701-PSD. Based on a review of the record and a conference of the Hearing Chair, parties, and interested persons who requested leave to participate, it is hereby ORDERED as follows:

1. The parties shall adhere to the following schedule, which shall not be modified except by leave of the Hearing Chairman for good cause shown:

DATE	EVENT/ACTION
March 17, 2011	Discovery may begin on this date and end on May 11, 2011.
May 2, 2011	Parties shall disclose the identity of all persons including experts expected to testify in the parties' cases in chief or cases in rebuttal and to provide all information regarding the expert(s) required by SDCL 15-6-26(b) and 15-6-26(e). The parties shall also exchange preliminary lists of witnesses expected to testify at the hearing in this matter.
May 11, 2011	Deadline to complete discovery. Any interrogatories, requests for production, or other written discovery requests shall be properly served so as to require answers or responses be provided prior to this deadline.
May 18, 2011 – May 20, 2011	Reserved for Hearings.

June 3, 2011	Deadline to submit proposed findings of fact and conclusions of law.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

By: \_\_\_\_\_  
Hearing Chairman

**BEFORE THE  
BOARD OF MINERALS AND ENVIRONMENT  
DEPARTMENT OF ENVIRONMENT AND NATURAL RESOURCES**

IN THE MATTER OF THE	)	
PREVENTION OF SIGNIFICANT	)	
DETERIORATION (PSD) AIR	)	
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1. The parties shall adhere to the following schedule, which shall not be modified except by leave of the Hearing Chairman for good cause shown:

DATE	EVENT/ACTION
March 17, 2011	Discovery may begin on this date and end on May 11, 2011.
May 2, 2011	Parties shall disclose the identity of all lay witnesses expected to testify in the parties' cases in chief or cases in rebuttal
May 17, 2011	Parties shall disclose the identity of all experts expected to testify in the parties' cases in chief or cases in rebuttal and to provide all information regarding the expert(s) required by SDCL 15-6-26(b) and 15-6-26(e).
June 1, 2011	Deadline to complete discovery. Any interrogatories, requests for production, or other written discovery requests shall be properly served so as to require answers or responses be provided prior to this deadline.
June 8, 2011	Deadline to submit dispositive motions.
June 14, 2011 -	Reserved for Hearings.

Exhibit B

June 16, 2011	
June 30, 2011	Deadline to submit proposed findings of fact and conclusions of law.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

By: \_\_\_\_\_  
Hearing Chairman